certain services must be; and (iii) the prices at which such carriers must sell their services to U.S. carriers. The Commission has exceeded its authority.

I. THE NPRM'S PROPOSED ENFORCEMENT MECHANISMS FAIL TO COMPORT WITH UNITED STATES OBLIGATIONS UNDER THE ITU TREATIES.

A. The NPRM Deviates From Accepted U.S. Practice By Unilaterally Imposing Settlement Rates On Non-U.S. Carriers.

The NPRM proposes to "require" that settlement rates for U.S. carriers be at or below unilaterally established FCC benchmarks.[1] Specifically, the NPRM proposes a number of potential FCC actions, including:

- directing U.S. carriers to settle at a rate dictated by the FCC; and
- directing that U.S. carriers pay a settlement rate no higher than the benchmark rate.[2]

The FCC's proposed enforcement mechanisms represent a significant departure from FCC practice. The 1992 Benchmark Order expressly declined to take action beyond nonbinding benchmarks; it did not impose settlement rates on non-U.S. carriers.[3] The

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[1] NPRM ¶ 63.

[2] NPRM ¶ 89. The NPRM also proposes directing U.S. carriers to negotiate settlement rate agreements that provide for a fixed expiration date. Id. The NPRM would also condition authorization for a U.S. carrier to provide international facilities-based service to an affiliated foreign market on the foreign affiliate offering U.S.-licensed international carriers a settlement rate within the proposed benchmark range. NPRM ¶ 76. Furthermore, the NPRM proposes to condition authorizations granted to foreign monopoly or dominant carriers to resell international private line services on an applicant's home country's accounting rates. NPRM ¶ 81.

[3] 1992 Benchmark Order at 8040, 8046 (declining to condition Section 214 authorizations on lower accounting rates); ("By setting this benchmark, we do not intend to prescribe

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proposed enforcement mechanisms also depart from the FCC's practice of working through existing ITU mechanisms and promoting bilateral and multilateral negotiations in order to lower accounting rates.[4]

B. The ITU Constitution And Regulations Preclude The FCC From Imposing Settlement Rates Upon Foreign Administrations As The NPRM Proposes To Do.

The United States is a signatory to every major ITU telecommunications agreement of the past decade.[5] The FCC has recognized that the ITU Treaties are binding upon the United States.[6]

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accounting rates for any country or region; rather this benchmark range represents a guideline for the amount which the Commission believes U.S. carriers should be paying. . .") Id. at 8041.

[4] See 1992 Benchmark Order at 8040; 1991 Report and Order at 3555 (1991).

[5] International Telecommunication Convention (Nairobi, 1982); International Telecommunication Regulations, Final Acts of the World Administrative Telegraph and Telephone Conference (WATTC-88) (Melbourne, 1988) ("ITU Telecommunication Regulations"); Constitution and Convention of the International Telecommunication Union, (Nice, 1989); Constitution and Convention of the International Telecommunication Union (Geneva, 1992), and Amendments to the Constitution and Convention (Kyoto, 1994). In addition to being signed by the United States, the Nairobi Convention was ratified by the United States Senate. 131 Cong. Rec. 17,674 (1985). The Geneva/Kyoto Constitution and Convention are currently pending ratification by the Senate, upon recommendation by the President, with the concurrence of the FCC. See Message from the President of the United States Transmitting the Geneva/Kyoto Constitution and Convention, Sept. 13, 1996, and Letter of Submittal of the Secy. of State, July 15, 1996, S. Treaty Doc. No. 104-34 (1996).

[6] Accounting Authorities Rules at 8681 ("Provisions of [ITU] Conventions and Regulations have treaty status and are therefore binding on the parties thereto."); International Communications Policies at 7375, 7380 n.6 ("Under the Convention, the signatories have agreed upon certain basic regulations that member administrations are bound to obey."); Nice Const., Article 6 ("The Members are bound to abide by the provisions of this Constitution, the Convention and the Administrative Regulations in all telecommunication offices and stations established or operated by them which engage in international services. . . .").

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The FCC's proposed unilateral imposition of accounting rates upon non-U.S. carriers would violate three fundamental principles of the ITU: sovereignty, negotiation, and mutuality. The preamble of the ITU Constitution recognizes "the sovereign right of each country to regulate its telecommunications. . . ."[7] The ITU Constitution acknowledges the importance of establishing accounting "rates as low as possible," but recognizes that this must be accomplished through "collaboration among [ITU] Members," and "taking into account the necessity for maintaining independent financial administration of telecommunication. . . ."[8]

The ITU Constitution explicitly addresses the settlement of disputes between ITU members regarding the interpretation or application of the ITU Treaties.[9] The Constitution provides that members may settle disputes "through diplomatic channels, or according to procedures established by bilateral or multilateral treaty concluded between them . . . or by

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It is accepted U.S. and international practice to abide by treaties and other international commitments, like the ITU regulations, constitutions, or conventions, that have been signed but are pending ratification. Vienna Conv. on the Law of Treaties, S. Exec. Doc. L 92-1 (1971), Art. 18; Restatement (Third) of Foreign Rels. § 312(3).

[7] Preamble to the International Telecommunication Convention (Nairobi, 1982) (signed by the U.S. and ratified by the U.S. Senate); Preamble to the Constitution of the International Telecommunication Union (Nice, 1989) (signed by the U.S.); Preamble to the Constitution of the International Telecommunication Union (Geneva, 1992, as amended, Kyoto, 1994) (signed by the U.S.; pending ratification by the U.S. Senate upon recommendation of the President and the Secretary of State). See also, Preamble to the ITU Telecommunication Regulations (identical language).

Following the Nairobi Convention, the ITU Constitution and Convention, which had, until then, been a single document, were separated, with the intention that the Constitution would be permanent and the Convention would be renewed every five years. The Nice Constitution retains the preambular language of the Nairobi Convention.

[8] ITU Const. art. 1.2.f (Geneva, 1992, as amended, Kyoto, 1994); International Telecommunication Convention, Art. 4.2.e (Nairobi, 1982).

any other method mutually agreed upon."[10] Should those methods fail, the ITU Constitution provides for recourse to arbitration.[11] Because the ITU Treaties do not contemplate unilateral enforcement by Members, the FCC has no basis for unilateral actions contrary to the provisions of the ITU Treaties, even in pursuit of goals largely endorsed by the ITU.

Article 1.5 of the ITU Telecommunication Regulations requires that international telecommunications services be provided "pursuant to mutual agreement between administrations [or recognized private operating agencies]."[12] Article 4.2 requires that ITU members ensure that carriers under their jurisdiction cooperate to provide international telecommunications services "by mutual agreement."[13]

The ITU Telecommunication Regulations require that accounting rates be established by mutual agreement.[14] Appendix 1 to the Regulations, also binding upon ITU members,[15] similarly requires mutuality in establishing accounting rates.[16]

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9 ITU Const. art. 56 (Geneva, 1992, as amended, Kyoto, 1994).

10 Id.

11 Id., art. 56.2.

12 ITU Telecommunication Regulations art. 1.5. The Regulations speak throughout about "administrations" and "recognized private operating agencies," which are defined as authorized entities within ITU Member states that provide international telecommunication service to the public. Id., art. 1.7.a.

13 Id., art. 4.2.

14 Id., art. 6.2.1. ("For each applicable service in a given relation, administrations...shall by mutual agreement establish and revise accounting rates to be applied between them, in accordance with the provisions of Appendix 1 and taking into account relevant CCITT Recommendations and relevant cost trends.")

15 Id.

The principles of national sovereignty, mutuality, and negotiation also inform ITU Telecommunication Recommendations, which typically represent a closely negotiated consensus among ITU members and carriers subject to their jurisdiction.[17] Recommendation D.140, provides that: "Accounting rates and accounting rate shares are established and revised through bilateral agreement."[18] The Recommendation admonishes that when negotiating such an agreement, "the Administrations concerned should, as far as possible, agree on the approach to be used."[19] The Recommendation prescribes a number of specific factors that should be taken into account in establishing or revising accounting rates or accounting rate shares, including changes in technology, the nature of the transmission routes used, economies of scale, and agreed routings; and differences in costs between countries.[20]

In outlining a detailed approach to negotiations, paragraph C.3.1.1 of the Recommendation prescribes that each party "independently conduct its own cost study using

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[16] Id., append. 1, ¶ 1.1. The principles of national sovereignty, mutuality, and negotiation are consistent with other provisions of the ITU Telecommunication Regulations. Thus, for example, the Regulations reserve to each administration or recognized private operating agency the right to establish the charges to be collected from its customers, and establishes that "the level of charges is a national matter." ITU Telecommunication Regulations art. 6.1.1.

[17] "In implementing the principles of these Regulations, administrations [or recognized private operating agenc(ies)] should comply with, to the greatest extent practicable, the relevant CCITT Recommendations. . . ." ITU Telecom. Regs. art. 1.6.; "The Member concerned shall, as appropriate, encourage the application of relevant CCITT Recommendations by such service providers." Id., art. 1.7.b. ("CCITT Recommendations" are now referred to as "ITU-T Recommendations").

[18] Recommendation D.140, annex C.2.1. Annex C states that, "This annex forms an integral part of this Recommendation."

[19] Id., annex C.2.3.

its own cost model . . . to determine its transmission, switches, and national extension costs."[21] The NPRM directly contradicts this approach and presumes to establish costs for all carriers based on a model selected exclusively by the FCC.

The 1992 Benchmark Order noted that the United States "strongly supports" Recommendation D.140, and eschewed "unilateral actions" to impose settlement rates.[22]

C. The NPRM Fails To Demonstrate Conformity With U.S. Obligations Under The ITU Treaties.

Although the NPRM is replete with references to the ITU Treaties and Recommendation D.140, it does not address how its proposed series of unilateral sanctions can be reconciled with United States obligations under the ITU Treaties.[23] Indeed, the NPRM

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[20] Id., annex C.2.4.

[21] Id., annex C.3.1.1.

[22] 1992 Benchmark Order at 8047. "We strongly support CCITT Recommendation D.140, and are confident that it will significantly affect foreign administrations' willingness to lower their accounting rates to cost-oriented levels within the specified one to five year time frame. Therefore, . . . we shall not take any unilateral actions, including establishing set rates or imposing additional regulations to foster lower net settlements outpayments, until we can evaluate . . . the effects of CCITT Recommendation D.140." Id. at 8043.

[23] See, e.g., NPRM ¶ 1 (recognizing the "ongoing effort" of "multilateral organizations such as the [ITU]. . . to reform the international accounting rate system," and specifically recognizing ITU mechanisms to attain such reforms) (citing ITU-T Recommendation D.140); NPRM ¶ 6 n.5 (citing International Telecommunication Regulation (Melbourne, 1988); Constitution of the International Telecommunication Union (Nice, 1989)); NPRM ¶ 15 (recognizing that, "ITU Recommendation D.140 calls for countries to adopt nondiscriminatory, cost-oriented and transparent accounting rates."); NPRM ¶ 17 (citing ITU-T Recommendation D.140); NPRM ¶ 6 n.5 (citing Article 9, International Telecommunication regulation) (Melbourne, 1988) and Article 31, Constitution of the International Telecommunication Union (Nice, 1989).) GTE considers that the Commission has failed adequately to discuss its positions on the issues raised in this section C; it further considers, as stated above, that on the data and record available, the

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acknowledges that its proposals go "beyond . . . multilateral steps to encourage settlement rate reform."[24] The NPRM essentially cites the ITU Treaties and Recommendation D.140 as supporting (or being consistent with) the goal of accounting rate reform, but ignores the provisions of the ITU Treaties and D.140 that are breached by the assumption of unilateral authority to: (1) impose the FCC's schedule for accounting rate reductions upon non-U.S. telecommunications authorities and carriers; (2) declare what those foreign authorities' and carriers' costs actually "must" be; and (3) set the prices at which foreign carriers must sell their services to U.S. carriers. The NPRM offers no justification for its abandonment of an approach that, if not entirely multilateral, stopped short of unilateral enforcement action contrary to the ITU Treaties.[25]

The Commission's assertion of the right, in effect, to dictate the rates at which foreign carriers may sell access to their networks is contrary to the ITU Treaties, particularly Article 6.1.2 of the ITU Telecommunication Regulations.

In comments on the development of the FCC benchmark approach, the NTIA repeatedly cautioned that the use of FCC enforcement mechanisms to prescribe FCC-dictated

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Commission could not justify its positions, which violate the ITU Treaties and exceed its jurisdiction under the Act.

[24] NPRM ¶ 18.

[25] As noted above, the 1992 Benchmark Order expressly acknowledged the potential relevance of Articles 6.1 and 6.2 of the ITU regulations, which, respectively, recognize that collection rates are "a national matter" and prescribe that accounting rate establishment and revision be by mutual agreement. See 1992 Benchmark Order at 8046 & n.63.

standards to foreign entities would exceed the FCC's jurisdiction.[26] The NTIA stated further that prescribing settlement rates "could have major consequences on sovereign entities, involving international telecommunications policy, commercial relations, foreign policy, and trade[:] . . . . all areas in which the Executive Branch properly has interests and a role to play in developing policy."[27] Because "international settlements involve certain issues that go beyond [the Commission's] regulatory jurisdiction," and because "the Commission cannot ensure that foreign administrations will accept lower accounting rates proposed by U.S. carriers," the NTIA concluded that "the Executive Branch must play a prominent role in bilateral and multilateral fora where settlement issues are addressed."[28]

Despite the NTIA's clear admonition, the FCC gives no indication whatsoever of having considered trade policy implications, comity, or other foreign policy considerations. The extraordinary step of unilaterally prescribing settlement terms to non-U.S. carriers should

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[26] Reply Comments of the National Telecommunications and Information Administration, CC Docket No. 90-337 at 7 (filed Sept. 27, 1991) ("Reply Comments of NTIA") ("The Commission's jurisdiction over international telecommunications services applies only to the U.S. end of a service, and the Commission cannot compel foreign entities to accept accounting rates prescribed by the Commission for U.S. carriers."); Comments of National Telecommunications and Information Administration, CC Docket No. 90-337 at 16 (filed Oct. 15, 1990) ("Comments of NTIA") ("[F]or international telecommunications services, the Commission's jurisdiction applies only to the U.S. end of the service."); id. at 17 ("Foreign governments and their telecommunications administrations . . . maintain independent sovereign authority over the foreign end of a call.")

[27] Comments of NTIA at 22.

[28] Comments of NTIA at ii, 21-22, Regulation of International Accounting Rates, (Oct. 15, 1990); see also id. at 21 ("[I]international settlements involve certain issues that go beyond [the Commission's] regulatory jurisdiction, and are properly within the domain of the Executive Branch.")

not be undertaken, because such action cannot be reconciled with U.S. obligations and articulated policy under the ITU Treaties.

II. THE COMMISSION DOES NOT HAVE JURISDICTION UNDER THE COMMUNICATIONS ACT TO PRESCRIBE MANDATORY BENCHMARKS.

A. The Communications Act Was Written With The ITU Treaties In Mind.

The Communications Act of 1934 (the "Act") grants the Commission broad authority to regulate interstate and foreign communications, with the goal of assuring that all Americans have access to radio and wire communications.[29] However, in delegating such broad authority to the Commission, Congress recognized the importance of treaties and regulations governing international communications and required that the Commission abide by such international treaties. Specifically, in Section 303(r), Congress instructed the Commission to make rules and regulations necessary to carry out the ITU Treaties and required that the Commission make only those regulations that are consistent with law.[30] The ITU Treaties are part of U.S. law and binding on the Commission.[31] The United States has been a member of the ITU and a party to the predecessors of the current ITU Treaties since before enactment of the Communications Act.[32] Section 303(r) expressly refers to "any international radio or wire

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29 47 U.S.C. § 151 (1934).

30 47 U.S.C. § 303(r) (1996).

31 See, e.g., United States v. Weiner, 701 F. Supp. 14, 15 (D. Mass. 1988) ("[t]he [Nairobi] Convention became effective in this country in 1986.")

32 See, e.g., International Telecommunications Convention (Madrid, 1932), 49 Stat. 2391, 3 Bevans 65; International Telecommunication Convention (Atlantic City, 1947), 63 Stat. 21399, 4 (. . .continued)

communications treaty or convention. . . or any regulations annexed thereto...."[33] Congress has intentionally bound the Commission to act only in conformity with the ITU Treaties. Consequently, the Commission lacks authority under the Communications Act to prescribe international accounting rates, because unilaterally dictating such rates would violate the ITU Treaties.

B. The Communications Act Confers No Jurisdiction Over Foreign Carriers.

The Act necessarily empowers the Commission to regulate only those carriers over which the United States has jurisdiction. Congress did not (and could not) delegate to the Commission the authority to prescribe rates foreign carriers may charge U.S. carriers for access to foreign networks. The Act is clearly and naturally drafted to distinguish between situations in which both parties to an interconnection or rate agreement are subject to the Commission's jurisdiction, and situations where one party is not subject to such jurisdiction. The NPRM, however, ignores that distinction and oversteps the Commission's jurisdiction.

In sections 201(b) and 205 of the Act, Congress generally delegates to the Commission the authority to regulate intercarrier charges where both (or all) carriers are subject to Commission jurisdiction. With respect to contracts involving a foreign carrier, however, section 201(b) prescribes a different regime, one that properly reflects the limits of U.S. jurisdiction. The second proviso in section 201(b) expressly permits U.S. carriers,

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Bevans 570; International Telecommunication Convention (Buenos Aires, 1952), 6 U.S.T. 1213; International Telecommunication Convention (Geneva, 1959), 12 U.S.T. 1761; International Telecommunication Convention (Montreux, 1965), 18 U.S.T. 575; International Telecommunication Convention (Malaga-Torremolinos, 1973), 28, U.S.T. 2495; see supra note 5 (recent ITU Treaties).

notwithstanding any other provision of law, to enter into and operate under contracts with foreign carriers unless those contracts are declared contrary to the U.S. public interest. This authority is narrower than the authority to determine whether U.S. carriers' charges or other practices are 'just and reasonable' under the main body of section 201(b). Instead of honoring this narrower authority where foreign carriers are involved, the Commission has extended its reach. Prohibiting a U.S. carrier from paying settlement rates above the benchmark levels is equivalent to prohibiting the foreign carrier from collecting above that rate. Limiting what foreign carriers can collect is effectively to prescribe what they may charge for access to their networks. Even if it could plausibly be argued that the Commission's assertion of authority to establish binding benchmarks is addressed only to U.S. carriers, there can be no doubt of the extraterritorial impact of the NPRM's sanctions. In this setting, the Commission bears the burden of establishing its jurisdiction.[34] It has failed to do so, and, indeed, no basis exists for the Commission's proposed unilateral actions.

C. The Statutory Provisions Cited By The Commission Do Not Confer Jurisdiction To Prescribe Mandatory Benchmarks.

The Commission has cited sections 1, 4(i), 201-205, and 303(r) of the Act as authority to promulgate and enforce the NPRM, including establishing mandatory settlement rates to be

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[33] 47 U.S.C. § 303(r) (1996).

[34] See Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991)(stating that an "affirmative congressional intent [is] required to overcome presumption against extraterritorial effect of legislation. . . ."); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-285 (1949).

negotiated by U.S. carriers within fixed time periods.[35] The language and legislative history of these provisions, however, do not support the Commission's claims. The Commission has limited authority under these sections, especially with respect to interfering with the settlement rates negotiated by U.S. carriers.

Sections 1 and 4(i) of the Act clearly set forth the general powers and purposes of the Commission. Section 1 establishes the Commission and charges it with regulating interstate and foreign radio and wire communications, consistent with the specific provisions of the Act.[36] Similarly, section 4(i) authorizes the Commission to regulate "as may be necessary in the execution of its functions" so long as the regulations are consistent with the Act.[37] These sections do not address intercarrier contracts or accounting rates. The Act confers substantive authority to regulate contracts and rates in subsequent provisions of the Act.[38]

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[35] 47 U.S.C. §§ 151, 154(i), 201-205, 303(r) (1996). The Commission properly avoids relying on § 211 as conferring jurisdiction to regulate contracts between U.S. and foreign carriers, or to prescribe rates. Section 211 merely requires that agreements between U.S. and foreign carriers be filed with the Commission. 47 U.S.C. § 211 (1934).

[36] 47 U.S.C. § 151 (1934).

[37] 47 U.S.C. § 154(i)(1934). This entire section is devoted to establishing various organizational and procedural requirements for the Commission. The legislative history of § 4 states that in addition to creating a bipartisan commission, this section "also provides for the appointment of personnel and contains other provisions usual in the case of creation of a new administrative body." H.R. Rep. 73-1850 (1934) ("Legislative History").

[38] The Commission also refers to §§ 2 and 3(17) in footnote 22 of the NPRM. These sections are limited to establishing the overall purpose and goals of the Commission. Section 2 limits the Commission's jurisdiction to interstate and foreign communications and reserves intrastate communications regulation to the States. Section 3(17) simply defines foreign communications. Neither section authorizes the Commission to regulate contracts between U.S. and foreign carriers or to prescribe accounting rates.

Similarly, sections 202-204 do not authorize the Commission to regulate intercarrier contracts or rates.[39] These provisions generally require carriers to provide services for all persons, and to file schedules of charges with the Commission.[40]

Section 303(r) sets forth the general powers of the Commission and authorizes the promulgation of rules and regulations necessary to carry out the requirements of the Act.[41] As discussed above, section 303(r) also reflects Congress' clear intention that the U.S. regulatory regime established by the Act conform to and function within the preexisting international regime governing telecommunications, especially the ITU Treaties. The section instructs the Commission to implement regulations necessary to meet U.S. treaty obligations, including the ITU Treaties. It does not empower the Commission to prescribe international accounting rates, especially rates expressly designed to undermine the system established pursuant to binding treaty obligations of the United States.

Section 201(b) authorizes the Commission to evaluate, in the public interest, rates arrived at in negotiations between U.S. and foreign carriers consistent with the procedures set forth in the ITU Regulations. The section expressly protects U.S. carriers' right both to enter

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[39] 47 U.S.C. §§ 202-204 (1996).

[40] Section 202 is directed to common carriers, not the Commission. It prohibits discrimination and undue and unreasonable prejudice by common carriers against any person or classes of persons. Section 203 addresses the filing and publication of schedules of charges, classifications, regulations and practices. Section 204 empowers the Commission to suspend and investigate proposed changes in schedules of charges, classifications, regulations and practices. The Commission, however, has no authority under these sections to regulate settlement rates in agreements with non-U.S. carriers.

[41] 47 U.S.C. § 303(r) (1996).

into and operate under contracts with carriers not subject to the Act.[42] The Commission's role, however, is limited to determining whether the resulting contracts are contrary to the public interest. Section 201(b) does not suggest that the Commission can prescribe rates.[43] Authority to determine that a contract is contrary to the public interest does not entail authority to prescribe, alter, or modify contract terms.[44]

Moreover, the legislative history of the Act is silent on the scope of section 201(b). As noted above, the only reference to the contract provision in the legislative history is that the provision is derived from the Interstate Commerce Act.[45] Thus, under section 201(b), the Commission cannot modify or replace the rate terms agreed upon by U.S. and foreign carriers. Such action by the Commission would essentially nullify Congress' express intent to allow U.S. and foreign carriers to negotiate international agreements.

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[42] 47 U.S.C. § 201(b). Section 201(b) states,

> That nothing in this [Act] or in any other provision of law shall be construed to prevent a common carrier subject to this [Act] from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest. . . .

[43] Legislative History at 5. The legislative history of § 201(b) only states, "section 201(b) requires reasonable charges, and limits the contracts for exchange of services between carriers to such contracts as the Commission deems 'not contrary to the public interest.' It is adapted from section 1(4) of the Interstate Commerce Act." Moreover, given the clear absence of jurisdiction over non-U.S. entities, an intent to extend the Commission's jurisdiction to foreign carrier's rates would have to be part of the statute.

[44] As discussed above, even if section 201(b)'s delegation of authority to ensure that charges and practices are 'just and reasonable' effectively permits the Commission to set rates for agreements among U.S. carriers, the second proviso of the section sets a different standard for contracts where one party is beyond U.S. jurisdiction.

In the event the Commission were to determine that a U.S. carrier's accounting rate agreement with a foreign carrier was contrary to the public interest, it could, after an opportunity for a hearing under section 205(a), set a maximum rate the U.S. carrier could charge its customers for international messaging telephone service on the foreign route. The Commission may not, however, as it has threatened in the NPRM, prohibit the U.S. carrier from honoring its agreement with the foreign carrier. Under section 201(b), the U.S. carrier would retain the option to: 1) renegotiate its agreement with the foreign carrier; 2) breach its agreement with the foreign carrier; or 3) absorb whatever loss might be implicit in honoring both its international contract and its legal obligation to U.S. customers based upon the Commission's section 201(b) public interest determination and section 205 rate prescription for the domestic aspects of the agreement.[46]

This approach to enforcement under section 201(b) gives the Commission the full benefit of the jurisdiction conferred by the Act without violating the ITU Treaties or impinging

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[45] Legislative History at 5.

[46] Despite wrongly deciding the scope of the Commission's authority under section 201(b), RCA Communications Inc. v. United States, 43 F. Supp. 851 (S.D.N.Y. 1942) correctly recognizes that agreement with entities beyond the jurisdiction of the United States confront both the Commission and the U.S. carrier with different options than when only domestic U.S. entities are involved. GTE notes that in the more than five decades since RCA was decided (on the eve of World War II), no court has ever cited the case for the proposition that section 201(b) of the Act confers rate setting authority on the Commission. Moreover, RCA is readily distinguishable in that it was decided in a significantly different legal context. Although the United States was a member of the ITU at the time of RCA, it was not a party to the particular ITU telegraph regulations at the center of the RCA controversy. RCA, 43 F. Supp. at 855. By contrast, the United States is currently bound by the ITU Treaties, including section 6.2.1. of the ITU Telecommunications Regulations, which is violated by the NPRM.

on another sovereigns' prerogatives.[47] By contrast, the NPRM would engage the Commission in setting prices for entities not under its jurisdiction. The United States would never accept a foreign sovereign's attempt to dictate the prices at which U.S. carriers must sell access to their domestic networks – nor would it accept the premise that a foreign sovereign could fairly be permitted to determine the cost U.S. carriers faced in providing such access. The sanctions in the NPRM overreach the Commission's proper jurisdiction and contradict the Commission's recognition, in other proceedings, that "[u]nlike domestic telecommunications, [the Commission's] jurisdiction over international service applies only to one end of the service. Authority over the foreign end resides in the particular foreign correspondent."[48]

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[47] Although the most likely result of this approach would be the renegotiation or breach of the settlement rate agreement between the U.S. and foreign carrier, neither would violate the ITU Treaties. A renegotiated contract would represent a mutual agreement, and a breach by the U.S. carrier would presumably give rise to a cause of action under national law.

[48] Uniform Settlement Rates on Parallel International Communications Routes, 84 F.C.C. 2d 121, 122 (1980).